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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 200

PHILIP P. KALODNER

PETITIONER

V.

SPENCER ABRAHAM, Secretary of Energy, LEE LIBERMAN OTIS, General Counsel, U.S. Department of Energy, GEORGE B. BREZNAY, Director, Office of Hearings and Appeals, and THOMAS L. WIEKER, Deputy Director, Office of Hearings and Appeals

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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94 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where the Court of Appeals for the District of Columbia Circuit recognizes that there is an issue as to whether it or the Court of Appeals for the Federal Circuit has appellate jurisdiction, may it proceed to determine whether a claim is barred by sovereign immunity without regard to whether or not it has appellate jurisdiction?

2. Does appellate jurisdiction reside in the Court of Appeals for the Federal Circuit as to the issue of the extent of the waiver of sovereign immunity provided by a statute as to which the Federal Circuit has exclusive jurisdiction?

3. Where the Court recognizes that sovereign immunity has been waived so as to provide private claimants the right to seek crude oil refunds initially recovered by the United States, may it nevertheless bar on the basis of sovereign immunity a claim for a common fund fee to be paid from such refunds to an attorney for some of the claimants who played a critical role in the recovery by the United States?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the case contains the names of all of the parties.

The parties have no corporate affiliates.

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CITATION OF REPORTS OF OPINIONS

The decision of the Court of Appeals for the District of Columbia Circuit as to which this petition for certiorari is filed is reported as Kalodner v. Abraham, 310 F. 3d 767 (D.C. Cir., 2002), The denials of the Petition for Panel Rehearing and for Rehearing en Banc are not reported officially.

The District Court Decision was rendered by a Memorandum Opinion and Final Order issued July 30, 2001. It is not reported officially, but it is reported at 4 Energy Mgmt. (CCH) par. 26,739.

JURISDICTION

The Judgment sought to be reviewed was entered November 19, 2002.

Timely filed Petitions for Panel Rehearing and For Rehearing En Banc were denied by Order entered January 10, 2003.

Jurisdiction of the Supreme Court is pursuant to 28 U.S.C. Sec. 1254.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, the pertinent text of which is set forth in the appendix are: Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (1971); Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627; Department of Energy Organization Act, 42 U.S.C. 7193; Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, 100 Stat. 1881 (1986), 15 U.S.C. 4502; 28 U.S.C. Section 1291; Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), 28 U.S.C. 1295 (a) (11); 10 C.F.R. Sections 205.280 et seq.

STATEMENT OF THE CASE

Plaintiff Philip P. Kalodner, an attorney, brought this action to seek a common fund fee for his services as counsel for intervenors in a public enforcement action brought by the U.S. Department of Energy ("DOE") against the Occidental Petroleum Corporation ("Occidental") to recover overcharges in the pricing of crude oil.

Pursuant to DOE's commitment and policy, 20% of any recovery obtained by it from Occidental is committed to distribution to identified end users of petroleum products pursuant to a formula based on their respective volumes of purchase; the balance of any recovery is divided equally by the United States and the States of the United States.

Kalodner was granted intervention in two phases of the DOE enforcement action on behalf of a group of 36 utilities, ocean transporters and manufacturers ("Utilities, Transporters and Manufacturers" or "UTM") who, by virtue of their purchase volumes are entitled to approximately 15% of the 20% of the funds to be distributed to end users.

Kalodner had sought such intervention in order to assist the prosecution arm of the DOE, and thereby insure and maximize the 20% of the recovery which would be distributed to his clients and some other 85,000 end users who had been found qualified to obtain refunds.

Intervention was granted Kalodner in the first phase of the enforcement action by the Federal Energy Regulatory Commission("Commission" or "FERC") and in the second phase of the enforcement action

by DOE's adjudicatory body, the Office of Hearings and Appeals ("OHA") before which that phase of the action was proceeding when the enforcement action was settled.

In the two phases of the enforcement action, the enforcement arm of the DOE sought on alternative theories a recovery which, with interest as of the time of the subsequent settlement, would have amounted to approximately $1 billion.

In the first phase of the enforcement action ("Occidental I"), Kalodner had sought intervention before OHA to advocate an "entitlements" theory of violation which DOE's enforcement arm had not advocated, and intervention was denied by OHA. Consolidated Edison Co. v. Breznay, 683 F. Supp. 832 (D.D.C. 1987), 873 F. 2d 301 (TECA 1989). OHA issued a Remedial Order based upon the "price" theory which had been advocated by DOE's enforcement arm. Occidental appealed to FERC pursuant to 42 U.S.C. Section 7193, and FERC vacated the OHA Remedial Order in Occidental I, reversing its own Administrative Law Judge who had recommended its affirmance in substantial part. Cities Service Oil and Gas Corp., 65 FERC par. 61,403 (1993), reconsideration denied, 66 FERC par. 61,222 (1994).

Kalodner sought intervention at the outset of the FERC proceedings to

support the Remedial Order and was denied intervention by the Administrative Law Judge. In its 1993 decision reversing its own Administrative Law Judge and vacating the OHA Remedial Order, the Commission also reversed the denial of intervention, explaining that "Utilities has demonstrated that it has an interest that is separate and distinct from the other intervenors in this proceeding, and that its interest cannot be adequately represented by any of the other parties." (65 FERC at 63,111-12, emphasis supplied). When, however, based upon such grant of intervention by the Commission, Kalodner sought in his motion for reconsideration the opportunity to brief and orally argue the matter before the Commission, the Commission in its decision affirming its prior decision, explained that it had granted intervention to Kalodner solely so that he might appeal the FERC decision vacating the Remedial Order.

Kalodner, on behalf of UTM, filed a Complaint in the District Court for the District of Columbia appealing the FERC vacation of the Occidental I Remedial Order, as did a group of States of the United States.("States"). The U.S. Department of Justice, on behalf of the Secretary of Energy moved to dismiss on the ground of lack of standing, albeit

acknowledging that the Secretary believed that FERC was in error, and such motion was granted by the District Court. Alabama v. FERC, 4 Energy Mgmt. (CCH) par. 26,693 (D.D.C. 1995).

Kalodner on behalf of UTM appealed to the Court of Appeals for the Federal Circuit and the Court of Appeals for the District of Columbia Circuit, and such appeals were pending at the time of the subsequent settlement, upon which event they were withdrawn.

In the interim, while the FERC appeal was pending, DOE enforcement issued a second Proposed Remedial Order ("PRO") in 1992, advocating, albeit somewhat obliquely, the Entitlements Analysis which Kalodner had originally proffered. ("Occidental II" or the "Entitlements Case"). Kalodner, on behalf of UTM sought the right to participate in the review of that PRO by OHA, and was granted such right to participate. Thereafter, in numerous testimonial hearings, Kalodner participated, cross-examining witnesses. On each and every occasion when briefs were permitted on various issues, and after the conclusion of hearings, Kalodner submitted briefs to the OHA.

At the time of the settlement with Occidental, the only proceeding remaining prior to OHA's decision on whether to

issue a Remedial Order, was oral argument before the Commission, in which Kalodner would have been a participant.

In 1995, a mediation was undertaken in an effort to settle the Occidental enforcement matter. Participating at the invitation of DOE and of Occidental were counsel for two groups of States of the United States acting on behalf of all States, and Kalodner on behalf not only of his clients, but on behalf of all the then 85,000 approved crude oil refund claimants who had been found by OHA to have suffered injury as a result of crude oil overcharges ("direct injury" or "end user" claimants).

The mediation concluded with a settlement by DOE and Occidental for $275 million to be paid over a period of years, 20% of which, or $55 million, was to be allocated to end user claimants on whose behalf Kalodner had acted. 60 Fed. Reg. 43130 (August 18, 1995).

Throughout the entire period from the initiation of the Occidental enforcement proceeding in 1985 until its conclusion with the settlement in 1995, before OHA, before FERC, in the Courts, and in the mediation, Kalodner alone represented the class of end user claimants entitled under the settlement to $55 million. At all times, Kalodner

asserted that his UTM clients were acting as class representatives and that he was acting on behalf of the entire class of end user claimants.

The Fee Application And the Refusal of DOE to Consider It on the Merits

On September 19, 1995, Kalodner filed an application for a fee for services rendered in the Occidental matter to the end user claimants. Such application was filed with the Secretary of Energy's representatives in the negotiations leading to the Occidental settlement.

The fee application sought $1,500,000 for services rendered to end user injury claimants other than the UTM group with whom Kalodner has fee arrangements. In support of the fee request, Kalodner submitted that "a reasonable argument can be made that the entire $55 million recovered for the end users, indeed the entire settlement of $275 million, was largely the result of Applicant's efforts," noting that as of the negotiation of the settlement, the only possibilities of a successful conclusion of the enforcement proceedings were the result of Kalodner's efforts:

(i) as to Occidental I, the

"price" case, the only possibility of reviving the OHA Remedial Order which had been vacated by FERC was in litigation which Kalodner, and James Flug Esq. on behalf of the States, had initiated, and were pressing in the face of DOE opposition;

(ii) as to Occidental II, the "Entitlements" case, then pending before OHA with the possibility of a Remedial Order, it "existed only because of the insistence of Applicant (Kalodner) that the Entitlements violation analysis was a proper alternative analysis, indeed the preferred method of analyzing the transactions." The Application noted that from the outset of the proceedings, DOE enforcement had eschewed directly asserting such analysis, and that although it had belatedly embraced such analysis as the basis of the PRO in Occidental II, it continued to "shie(d) away from a direct assertion of an Entitlements violation," leaving only Kalodner as the direct advocate of the "Entitlements" violation analysis. As a result, the possibility of obtaining and sustaining a Remedial Order in Occidental II depended entirely on the analysis proffered and pressed by Kalodner.

On October 17, 1995 the Application which Kalodner had filed with

the Secretary's settlement representatives was transmitted to OHA for disposition.

By "final Order" issued July 16, 1997, signed on behalf of defendant Breznay, OHA denied the fee application of Kalodner on the basis that OHA, and therefore DOE, was without power to grant such. (Appendix, 22a).

Kalodner filed a Complaint in the District Court for the District of Columbia appealing OHA's refusal to consider and award a common fund fee, and asking the court to determine and award such. Jurisdiction resided in the District Court by virtue of 28 U.S.C. Sections 1331, 1361 and Sections 210 and 211 of the Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (1971) (Appendix, 37a).

The Complaint alleged, and the defendants' Answer did not deny, that, as of the settlement, two years prior to the filing of the Complaint, $55 million "was to be allocated to direct injury claimants." The pleadings contained no facts with regard to the extent to which the $55 million had as of their filing been distributed to the direct injury (end user) claimants.

The Complaint provided, as had Kalodner's fee application to DOE, a summary of the services Kalodner had

provided for the benefit of the claimants, the award to whom Kalodner sought to charge for a fee. It noted that the relevant administrative procedural rules of the DOE and FERC (10 C.F.R. Sec. 205.194, FERC Rule 906) provide for class representation of the same nature provided for by Federal Rule of Civil Procedure 23, and it noted that DOE had specifically invited Kalodner as the only attorney who had intervened and participated in the administrative litigation to participate in the mediation effort which resulted in the settlement and the award to the claimants. It noted also the two prior occasions in which in similar situations, DOE had agreed to, and provided for, a Common Fund Fee to counsel, including Kalodner. In re The Department of Energy Stripper Well Exemption Litigation, Appeal of Philip P. Kalodner, 855 F. 2d 871 (TECA 1988), Citronelle Settlement Agreement, approved by the District Court in Amoco Oil Company et al v. DOE et al., C.A. H-94-2423 Dist. Ct. Southern District Texas (1995).

The Defendants, officials of DOE, filed an Answer, and moved to dismiss on the pleadings, asserting that the Complaint failed to state a claim upon which relief can be granted. After briefing but without providing oral

argument which Kalodner had requested, Judge Richard W. Roberts issued a Memorandum Opinion and Order on July 30, 2001 granting the DOE motion for judgment on the pleadings, explaining that "Defendant is entitled to judgment on plaintiff's complaint," and denying cross motions for summary judgment as "moot." (Appendix, 9a et seq.)

The District Court Memorandum Opinion first analyzes the Kalodner application as a claim for allocation of funds recovered by the DOE "under the public remedies section of the EPAA", to wit ESA Section 209, and holds that the only persons who may qualify to appeal a determination of the DOE denying them Section 209 recovered funds are those who assert injury by a violation of the ESA/EPAA and seek a refund of overcharges by virtue of such injury. The Court holds that since Kalodner was not injured by a violation of the ESA/EPAA, he is not entitled to judicial review of the DOE denial of his application.

Turning to Kalodner's argument for fees pursuant to the Common Fund Doctrine, the Memorandum Opinion expresses the view that the Doctrine is applicable only where "attorney's fees may be awarded either as part of a settlement covering some private litigation or by a court in connection

with a class action." The Court explains that neither the Common Fund doctrine nor the history of DOE's prior agreement to fees to Kalodner and others for their efforts in connection with other DOE recoveries "provide a basis for this Court to review the OHA's decision to deny attorney's fees to plaintiff from a fund which was established as a result of a settlement of a Sec. 209 enforcement proceeding". (Appendix, 19a).

Appeals were taken both to the Court of Appeals for the Federal Circuit and the Court of Appeals for the District of Columbia Circuit because of an anticipated issue as to which court had jurisdiction. Appellant Kalodner believed that as to the central issue on appeal, the applicability of the common fund fee doctrine to the instant matter, jurisdiction resided in the District of Columbia Circuit, while the appellee DOE asserted that jurisdiction resided in the Federal Circuit. Upon Kalodner's motion, the Federal Circuit stayed its proceedings pending a final decision by the District of Columbia Circuit. After briefing and oral argument, the District of Columbia Circuit issued its decision affirming the District Court December 19, 2002 (Appendix, 1a et seq.).

In its decision, the Court of

Appeals for the District of Columbia Circuit recognized "the complex jurisdictional issues in this case, including whether appellate jurisdiction is with this Court (the D.C. Circuit) or the Federal Circuit," but determined that it did not "require our attention, for Kalodner's suit is barred by sovereign immunity...(courts may address sovereign immunity prior to other 'non-merits decisions')" (Appendix, 4a)

The Court determined that there was sovereign immunity (i) because, as it understood the factual situation, the funds sought were in the possession of the United States, and (ii) because it believed that the Congressional waiver of sovereign immunity as to crude oil refunds recovered by the government extended only to end users of oil products injured by crude oil overcharges (presumably by virtue of Section 209 of the Economic Stabilization Act ("ESA"), Pub. L. 92-210, 85 Stat. 743 (1971) (Appendix, 36a), as incorporated in the Emergency Petroleum Allocation Act, ("EPAA") Pub. L. 93-1259, 87 Stat. 627 (Appendix 41a), and as further construed by Congress in the Petroleum Overcharge Distribution and Restitution Act ("PODRA"), 15 U.S.C. Sec. 4501 et seq. (Appendix, 44-45a)).

Petitions for rehearing and for

rehearing en banc were filed by Kalodner, and denied by orders entered January 10, 2003 (Appendix, 34-35a).

ARGUMENT

I THE DISTRICT OF COLUMBIA CIRCUIT ERRED IN ASSERTING IT HAD THE RIGHT TO DETERMINE THAT SOVEREIGN IMMUNITY BARRED THE ACTION WITHOUT REGARD TO WHETHER OR NOT IT HAD APPELLATE JURISDICTION

In its decision, the Court of Appeals for the District of Columbia recognized that there was a serious issue as to whether it, or the Court of Appeals for the Federal Circuit, had appellate jurisdiction, but determined that it could proceed to decide the issue of whether sovereign immunity barred the claim, regardless of whether or not it had appellate jurisdiction.

The principle so enunciated--that a federal appellate court without appellate jurisdiction may address and determine that there are jurisdictional barriers precluding plaintiff--represents a dangerous misreading of this Court's decisions.

In Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 95 (1998), which the D.C. Circuit cites as

authority, this Court recites the history of its insistence that ""'(E)very federal appellate court has a special obligation to 'satisfy' itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' Mitchell v. Maurer, 293 U.S. 237, 2442 (1934)'"". Arizonans for Official English v. Arizona, 520 U.S. 43, 73 (1997), quoting Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986)

In Steel, the jurisdictional issue related to the Article III standing of the plaintiff, this Court holding that it must first be determined prior to addressing the merits of the plaintiff's claim.

In Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, (1999) this Court held that "in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy" and the court may properly address the issue of personal jurisdiction before turning to the more complex issue of whether there is federal subject-matter jurisdiction.

In neither Steel nor Ruhrgas did this Court suggest that where the issue was which federal court has jurisdiction, that issue could be ignored in favor of an immediate consideration of the defense which the plaintiff would face in either

court.

Indeed, in Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988), this Court vacated a judgment of the Court of Appeals for the Federal Circuit which had determined that even though it believed that it did not have appellate jurisdiction, it could proceed to address the merits in the "interest of justice." This Court, finding that the issue of appellate jurisdiction must first be determined before the merits could be addressed, remanded the matter to the Federal Circuit with direction to transfer the case to the regional (Seventh) circuit court.

Christianson stands for the principle here directly applicable, i.e. that where there is an issue of which federal appellate court has jurisdiction, it must first be determined before proceeding to determine the merits of the appeal. At the minimum, therefore, this case should be remanded to the District of Columbia Circuit for a determination as to whether or not it has appellate jurisdiction as to the specific issue which it here decided.

II WHERE THE ISSUE IS THE EXTENT OF THE WAIVER OF SOVEREIGN IMMUNITY BY VIRTUE OF A STATUTE AS TO WHICH THE FEDERAL CIRCUIT HAS EXCLUSIVE JURISDICTION, APPELLATE JURISDICTION IS IN THE FEDERAL CIRCUIT

Pursuant to Section 211 of the ESA, appellate jurisdiction was assigned to the Temporary Emergency Court of Appeals ("TECA") as to all "cases and controversies arising under this title or under regulations or orders issued thereunder." (Appendix 40a).By virtue of the Federal Courts Administration Act of 1972, Pub. L. No. 102-572, 106 Stat. 4506 (1991) TECA was dissolved and jurisdiction pursuant to the ESA was transferred to the Court of Appeals for the Federal Circuit. (Appendix 46a).

In Texas American Oil Corp. v. U.S. Department of Energy, 44 F. 3d 1557, 1563 (Fed. Cir. 1995), the Federal Circuit, acting en banc, explicitly adopted the precedent of its predecessor, the Temporary Emergency Court of Appeals ("TECA") as to the issue of its jurisdiction. The Federal Circuit concluded after a review of TECA precedent that TECA had "interpreted its statutory authorization under ESA Sec. 211(b)(2) as meaning 'issue' jurisdiction, not 'case' or 'arising under' jurisdiction," and that

accordingly it would do the same.

The Federal Circuit reiterated in Texas American the "two threshold jurisdictional requirements (for its exclusive appellate jurisdiction): (1) resolution of the litigation must have required application or interpretation of the EPAA/ESA or its regulations, and (2) the EPAA/ESA issue must have been adjudicated in the district court." Texas American, supra, 44 F. 3d at 1563.

The District of Columbia Circuit has recognized the exclusive jurisdiction of the Federal Circuit as construed by the Federal Circuit, doing so both here (Appendix 4a), and its prior decision in Consolidated Edison Co. v. Ashcroft, 286 F. 3d 600 (D.C. Cir. 2002).

In its decision here, the Court below explicitly recognized, and accepted as binding precedent, decisions of the Federal Circuit which have consistently found no sovereign immunity from claims against funds recovered by the Department of Energy for "restitution" pursuant to ESA Section 209, citing specifically Goodyear Tire & Rubber Co. v. Dep't of Energy, 118 F. 3d 1531 (Fed. Cir. 1997) and Consolidated Edison Co. v. Richardson, 233 F. 3d 1376 (Fed. Cir. 2000).

The Court expressed its understanding, however, that in those

cases, the Federal Circuit had recognized the waiver of sovereign immunity by Congress only as to those asserting that they had been directly injured by the overcharges, citing the DOE regulations permitting such claims, 10 C.F.R. Subpart V (Appendix 47a et seq.). It held that a claimant for a common fund fee for obtaining funds for those alleging injury was not himself a Subpart V claimant, and therefore was barred by sovereign immunity from asserting a claim to a portion of the refunds obtained by the Subpart V claimants.

The error of the District of Columbia Circuit was at least two-fold:

(i) The Congressional waiver of sovereign immunity, by the statutes it enacted, i.e. ESA, as incorporated in the EPAA and as construed in PODRA, was as to any funds recovered for "restitution". It in no way purported to limit the waiver so as to preclude the payment of a common fund fee from the restitution funds to an attorney obtaining those funds for the Subpart V claimants;

(ii) the claim for common fund compensation is not made by Kalodner pursuant to the DOE Subpart V regulations, but rather pursuant to the common fund doctrine as promulgated by this Court in such decisions as Boeing v. Van Gemert,

444 U.S. 472 (1980).

In any event, the issue which the District of Columbia Circuit determined, i.e. the extent of the waiver of sovereign immunity as to restitution funds by virtue of the ESA and EPAA, falls within the Federal Circuit's exclusive jurisdiction. It clearly meets the first requirement that "resolution of the litigation must have required application or interpretation of the EPAA/ESA or its regulations," Texas American Oil Corp. v. U.S. Dept. of Energy, supra, 44 F. 3d at 1563. . And it also meets the second requirement, i.e. "the EPAA/ESA issue must have been adjudicated in the district court", id; the issue of sovereign immunity was argued by DOE in the District Court, and although not denominating it as a matter of sovereign immunity, the District dismissed on the basis that plaintiff did not qualify as a Subpart V claimant, the same basis on which the District of Columbia Circuit found that there was sovereign immunity.

Accordingly, the issue upon the basis of which the District of Columbia Circuit dismissed, i.e. the extent of the waiver of sovereign immunity by virtue of the ESA and EPAA, is a matter within the exclusive jurisdiction of the Federal Circuit. The matter should be remanded to

the District of Columbia Circuit with a direction to transfer the appeal to the Federal Circuit.

III IN THE ALTERNATIVE, IF THE COURT BELOW PROPERLY CONSIDERED THE ISSUE OF SOVEREIGN IMMUNITY, ITS RECOGNITION THAT SOVEREIGN IMMUNITY HAD BEEN WAIVED AS TO RESTITUTION FUNDS REQUIRED IT TO RECOGNIZE THAT THE WAIVER EXTENDED TO A CLAIM FOR A COMMON FUND FEE TO BE PAID FROM SUCH FUNDS

The District of Columbia Circuit's affirmance of the District Court's dismissal depended on (i) its legal holding that although end user (Subpart V) claimants to funds still in the Treasury are not barred by sovereign immunity from seeking such funds, one claiming a common fund fee from such funds for making their recovery possible is barred by sovereign immunity, and (ii) its factual assumption that the "funds at issue", i.e. the Occidental restitution funds, "remain in the Treasury." (Appendix, 6a).

If the Court was incorrect in either case, its affirmance of dismissal is unwarranted: (i) if, as plaintiff contends, the waiver of sovereign immunity as to claims by end users extends to a common fund fee claim for making such restitution funds available, then even if

the funds remain in the Treasury, a suit to recover them is not barred, and (ii) to the extent to which the Occidental funds have already been disbursed, a claim for a common fund fee from other funds remaining in the Treasury and destined for distribution to those same claimants is not barred by sovereign immunity, National Treasury Employees Union v. Nixon, 521 F. 2d 317 (D.C. Cir. 1975).

The District of Columbia Circuit not only erred in both (i) its legal holding excluding a common fund fee claim from the waiver of sovereign immunity as to restitution claims, and (ii) its factual assumption that the Occidental funds remained in the Treasury, but in doing so, it violated fundamental and well established principles of law; in the former case, this Court's promulgation of the common fund fee doctrine, and in the latter case, the mandate that a court is restricted to the allegations of the pleadings in rendering judgment on the pleadings.

Each of these errors will be considered in turn:

A. The failure of the Court below to recognize that the statutory waiver of sovereign immunity as to restitution funds necessarily includes a waiver as to a

common fund fee claim to be paid from such restitution funds constitutes a failure to honor decisions of this Court establishing the common fund fee doctrine

The District of Columbia Circuit's decision recognizes that "Congress has waived sovereign immunity for Subpart V claimants--parties actually injured by violations of the EPAA --by authorizing them to seek refunds from escrow accounts held in the United States Treasury..." , citing decisions of the Federal Circuit to that effect. (Appendix 6-7a).

Accordingly, were the DOE to fail to distribute to "parties actually injured" the $55 million "to be allocated to direct injury claimants on whose behalf plaintiff had acted," (Complaint), the claimants would not be barred by sovereign immunity from seeking such allocated funds from the U.S. Treasury accounts in which the allocated funds had been placed pending distribution to the claimants.

If the $55 million in funds are not immune from being sought by claimants, then they are necessarily not immune from being sought (to the extent of some 3%) by an attorney who has asserted that he was instrumental in obtaining the $55 million for the claimants.

The Common Fund Doctrine provides

that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

The lack of formal class certification is irrelevant. As this Court noted, "(T)hat the party...neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursement..." Sprague v. Ticonic Bank. 307 U.S. 161, 166 (1939).

Nor does the fact that the benefit was conferred by virtue of a settlement of litigation rather than by a judgment preclude the award of a Common Fund fee. Even in the stricter case where the award is of a statutory fee, this Court has held that "settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees." Buckhannon Board and Care Home Inc. v. West Virginia Dept. of Health & Human Resources, 532 U.S.598 (2001).

There is no indication in the various pronouncements by the Supreme Court as to the existence of a common fund

doctrine, e.g. Boeing Co. v. Van Gemert, supra, Sprague v. Ticonic Bank, supra, that common fund fees are unavailable where the recovery is from funds in the U.S. Treasury which have been allocated without restriction to private claimants. Once that is done, as it is alleged by the Complaint to have been done here, what the District of Columbia Circuit has called the "public fisc", National Treasury Employees Union v. Nixon, supra, is no longer involved, and there is no basis for invocation of the barrier of sovereign immunity.

The essential requirement for there to be sovereign immunity is that the relief sought will have an impact on the federal government, either (i) by virtue of depriving the Treasury of funds which it would otherwise retain, see VGS Corp. v. United States Dept. of Energy, 808 F. 2d 842 (TECA 1986), or (ii) by depriving the federal government of control over funds which it would otherwise exercise, as in the case of federal grants where the government has a continuing interest over the use of the funds by the grantee. See, e.g. National Association of Farmworker Organizations v. Marshall, 628 F. 2d 23, 26 (D.C. Cir. 1979) where the Court distinguished the situation of grant funds as to which "the Secretary has continuing

control over the funds, even when they are in the grantee's hands, and can audit the grantee's accounts or recall the funds," from the situation in National Treasury Employees Union v. Nixon, supra, and here, where "the government has no interest or right of continuing control" once the funds are allocated to claimants.

Where, there is, as here, an unrestricted allocation of funds to claimants from the government, there is no basis for a sovereign immunity barrier to common fund fee recovery.

B. The assumption by the Court below that the Occidental restitution funds remain in the U.S. Treasury has no basis in the pleadings or in fact, and its assumption violates the fundamental principle that the court is restricted to the allegations of the pleadings in granting judgment on the pleadings

Inasmuch as the District Court granted judgment on the pleadings, the only relevant fact with regard to the status of the $55 million is, as averred by plaintiff in his Complaint, and as not denied by defendants, that it "was to be allocated to direct injury claimants," (Complaint).

There are no facts in the

pleadings with regard to whether the $55 million is in the Treasury, or has rather already been distributed to the claimants to whom it was "allocated."

If the actual situation of the $55 million, i.e. whether it is in the Treasury, or has already been distributed, were alleged in the pleadings and therefore the proper subject matter of judgment on the pleadings, it would properly be described as follows: DOE has transferred to Treasury accounts captioned "Crude Tracking Claimants" some $674 million in crude oil refunds obtained by it, including, in a number of installments over a period of years the $55 million (plus interest) recovered from Occidental and allocated to claimants, has earned in those Treasury accounts some $197.5 million in interest, and has distributed $612.5 million from those accounts to the claimants, leaving a balance of $258 million. It is therefore not possible to ascertain to what extent the $55 million and interest paid by Occidental and deposited in the "Crude Tracking Claimants" accounts in the U.S. Treasury has been paid to claimants, and to what extent it remains in the Treasury accounts committed to claimant distribution.

In either case---(i) whether the relevant facts were only that $55 million

has been allocated to the claimants (as is the case in judgment on the pleadings), or (ii) whether the relevant facts are actually developed on the record, making it impossible to determine to what extent the $55 million has been paid to claimants and to what extent it remains in the Treasury---the decision of the District of Columbia Circuit Court in National Treasury Employees Union v. Nixon, supra, teaches that it is appropriate to charge funds still remaining in the Treasury to be paid out to claimants with a common fund fee for obtaining the $55 million for the claimants.

In National Treasury Employees Union v. Nixon, where the recovered retroactive salary payments had already been paid to 3.5 million government employees, the Court contemplated the possibility that a common fund fee for such recovery might properly be recovered from "future salaries either through direct payments by the Federal Government into the court (and corresponding deductions from salary checks) or some meaningful equivalent." (521 F. at 321-322).

Thus, if the only relevant fact considered is that the $55 million has been "allocated" to claimants, charging funds remaining in the Treasury to be

disbursed to those to whom the $55 million was allocated is appropriate and not barred by sovereign immunity.

And if the actual fact is considered, i.e. that it is impossible to determine to what extent the $55 million has already been disbursed to the claimants because of the commingling of funds, then payment of a common fund fee from funds to be disbursed to the claimants, but still remaining in the Treasury, is also clearly indicated as appropriate pursuant to National Treasury Employees Union v. Nixon.

CONCLUSION

For the reasons above stated, a writ of certiorari should be granted.

Respectfully submitted,

Philip P. Kalodner
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Petitioner Pro Se

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

Argued October 17, 2002 Decided November 19, 2002
No. 01-5339

Philip P. Kalodner,
Appellant
v.
Spencer Abraham, Secretary of Energy, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 97cv02013)

Philip P. Kalodner, appellant appearing pro se, argued the cause and filed the briefs.

Edward Himmelfarb, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief was *William Kanter*, Deputy Director.

Before: Edwards, Randolph and Tatel, *Circuit Judges*.
Opinion for the Court filed by *Circuit Judge* Tatel.

Tatel, *Circuit Judge*: In this case involving Emergency Petroleum Allocation Act refunds to consumers of crude oil,

appellant, an attorney, seeks an award of fees under the common fund doctrine for helping third parties recover money from a government-created escrow account held in the United States Treasury. Because the government has not waived its sovereign immunity, we affirm the district court's denial of his request.

I.

Enacted in 1973, the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. §§ 751-760h (repealed 1981), gave the federal government authority to establish and administer a program of mandatory price controls for crude oil and related petroleum products. The statute, incorporating the enforcement mechanism set out in section 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 (expired 1974), authorized the Department of Energy (DOE) to institute administrative enforcement proceedings against alleged violators of the EPAA and to obtain restitution from them. 15 U.S.C. § 754(a)(1). The Petroleum Overcharge Distribution and Restitution Act, 15 U.S.C. §§ 4501-4507, part of which remains in effect today, directs the Secretary "to identify persons who have been harmed by a violation of the EPAA regulations and to use recovered funds to make restitution [to such persons] 'to the maximum extent possible.'" *Consol. Edison Co. v. O'Leary*, 131 F.3d 1475, 1478 (Fed. Cir. 1997) (quoting 15 U.S.C. § 4502). DOE determines both eligibility for restitution and the amount each

person should receive according to standards set forth in 10 C.F.R. pt. 205, subpt. V—the so-called Subpart V procedures.

The procedural and substantive history of this case is complex, but little of it relates to the narrow issue before us. Suffice it to say that in 1992, Cities Service Oil and Gas Corporation, the predecessor to Occidental Petroleum Corporation, agreed to settle DOE section 209 charges alleging certain violations of the EPAA. Under that settlement, Occidental agreed to make payments to a restitution fund for distribution to end users of Occidental's crude oil, to certain states, and to the United States. The restitution fund "is held in an escrow account in the [United States] Treasury." Appellee's Br. at 26.

To settle additional allegations that it violated the EPAA, Occidental entered into a separate agreement with another group of end users, clients of appellant Philip Kalodner. This included an award of $400,000 in attorney's fees to Kalodner.

Kalodner subsequently filed a claim with DOE seeking an award of attorney's fees from the fund established through DOE's settlement with Occidental. Although neither Kalodner nor his clients were parties to that settlement and although he had already received a substantial fee award, Kalodner alleges that his work on behalf of his clients benefitted the entire class of end users, entitling him to still more fees. Expressly disclaiming that he qualifies as a Subpart V claimant, Appellant's Reply at 21, Kalodner argues that he is entitled to an award pursuant to the common fund fee doctrine. *See*

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (recognizing that under common fund fee doctrine "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"). Both DOE and the district court rejected Kalodner's claim. Kalodner appeals.

II.

Neither the complex jurisdictional issues in this case, including whether appellate jurisdiction is with this Court or the Federal Circuit, *see Tex. Am. Oil Corp. v. United States Dep't of Energy*, 44 F.3d 1557, 1563-64 (Fed. Cir. 1995), nor the merits of Kalodner's common fund claim require our attention, for Kalodner's suit is barred by sovereign immunity. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (courts must establish jurisdiction before addressing merits); *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (courts may address sovereign immunity prior to other "non-merits decisions"). "The basic rule of federal sovereign immunity," the Supreme Court has explained, "is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). The federal government is "immune from suit save as it consents to be sued," *United States v. Sherwood*, 312 U.S. 584, 586 (1941), and "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Although arguing that this action "is against the United States only in its capacity as escrowee of funds belonging to end users found entitled to restitution," Appellant's Reply Br. at 16-17, Kalodner's common fund fee claim nevertheless implicates federal sovereign immunity for a simple reason: He seeks funds in the United States Treasury. According to the government, its sovereign immunity defense is especially strong because the United States may recover any funds that remain in the escrow account after distribution to end users. *See* Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27,899 (Aug. 4, 1986); Order Implementing Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 Fed. Reg. 29,689-02 (Aug. 20, 1986) (directing excess funds in escrow account after disbursements have been made to be deposited in general fund of the United States Treasury). Kalodner insists that nothing will remain in the escrow account because all funds will be distributed on a pro rata basis to Occidental's end users. Appellant's Reply Br. at 14-15 (citing *Consol. Edison Co. v. Richardson*, 233 F.3d 1376, 1379 (Fed. Cir. 2000) (Subpart V claimants have standing to challenge awards to other Subpart V claimants because the awards are distributed on a pro rata basis and "any increase in the size of the total consumed volume.... directly reduces the share of each claimant")). We need not resolve that debate, however, for the *sine qua non* of federal sovereign immunity is the federal government's *possession of* the money in question. The government need not have an

actual interest in the funds in order to invoke the defense. *See United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947) (federal sovereign immunity precludes award of pre-judgment interest based on funds held by the United States but belonging to private parties); *VGS Corp. v. United States Dep't of Energy*, 808 F.2d 842, 846 (Temp. Emer. Ct. App. 1986) (for purposes of sovereign immunity, that the government has never claimed a right to the money "does not remove the obstacle presented by the *N.Y. Rayon* case").

Kalodner relies on *National Treasury Employees Union v. Nixon*, 521 F.2d 317 (D.C. 1975), where we rejected a sovereign immunity defense against a claim for attorney's fees. Appellant's Reply Br. at 17. In that case, however, the funds at issue had already been distributed to private parties, so the money was no longer in the government's possession. *Nat'l Treasury Employees*, 521 F.2d at 320 ("[W]e believe that sovereign immunity does not bar the award of attorney's fees and litigation expenses against private parties merely because some incidental expense might be imposed upon the Government by such an award."). As Kalodner concedes, the funds at issue here remain in the Treasury. They are thus fully protected by sovereign immunity.

Kalodner has also failed to identify a statutory waiver of immunity that would allow him to bring his common fund fee claim. Congress has waived sovereign immunity for Subpart V claimants—parties actually injured by violations of the EPAA—by authorizing them to seek refunds from escrow

accounts held by the United States Treasury and to challenge awards to other claimants. *See Goodyear Tire & Rubber Co. v. Dep't of Energy*, 118 F.2d 1531 (Fed. Cir. 1997) (party allegedly injured by EPAA violation challenged DOE's denial of its claims for price refunds); *Consol. Edison Co. v. Richardson*, 233 F.3d 1376 (holding that Subpart V claimants have standing to challenge awards to other claimants). But as Kalodner concedes, he is not a Subpart V claimant nor was he injured by a violation of the EPAA. Appellant's Reply Br. at 21.

Because Kalodner's claim is barred by sovereign immunity, we affirm the district court's denial of his fee request.

So ordered.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed for the reasons set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

Date: November 19, 2002

Opinion for the court filed by Circuit Judge Tatel.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP P. KALODNER	)	FILED
	)	JUL 30 2001
Plaintiff	)	
v.	)	Civil Action No. 97-2013
	)	(RWR)
SPENCER ABRAHAM,	)	
Secretary of Energy, et al.,	)	
Defendants	)	

MEMORANDUM OPINION

Plaintiff Philip P. Kalodner filed this lawsuit as an appeal from a decision by the Department of Energy ("DOE"), through the Office of Hearings and Appeals ("OHA"), denying his application for attorney's fees. Plaintiff seeks an order vacating the OHA's decision and remanding the application for attorney's fees to the DOE with instructions that it be reviewed and decided by the Secretary of Energy or a designee other than the OHA. In the alternative, plaintiff asks this Court to decide the merits of his fee application.

The DOE, through its Secretary, has moved for judgment on the pleadings arguing that plaintiff has failed to state a valid legal claim and cannot appeal the OHA's decision. Because plaintiff has no right of action for attorney's fees and

his challenge to the OHA's refusal to distribute attorney's fees to him from a restitution fund is non-justiciable, defendant is entitled to judgment on plaintiff's complaint.[1]

BACKGROUND

I. Statutory Background

The Emergency Petroleum Allocation Act of 1973 ("EPAA), 15 U.S.C. § 751-760h (1982), was enacted to allocate limited petroleum resources fairly and at equitable prices. The EPAA incorporated the dual, separate public and private enforcement procedures contained in sections 209 and 210 of the Economic Stabilization Act ("ESA"). See 15 U.S.C. § 754(a). The public enforcement procedure, § 209, provides for an administrative proceeding by the DOE against alleged violators of the EPAA and permits the DOE to obtain restitution from the violators. Section 210 permits any "person suffering legal wrong because of any act or practice arising out of the [EPAA] or any order or regulation issued pursuant thereto" to file a civil lawsuit against the alleged EPAA

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[1] Defendant and plaintiff also filed motions for summary judgment on the merits of plaintiff's appeal. Because of the Court's disposition of the motion for judgment on the pleadings, the motions for summary judgment will be denied as moot.

violator. See Consolidated Edison Co. v. O'Leary, 131 F.3d 1475, 1478 (D.C. Cir. 1997).

The Economic Regulatory Administration ("ERA"), an office in the DOE, was responsible for enforcing the mandatory price and allocation regulations issued by the DOE under § 209 of the EPAA. The ERA would investigate alleged EPAA violations and issue a proposed remedial order ("PRO") to a firm or individual believed to have violated the EPAA. See 10 C.F.R. § 205.192(b). If the recipient of a PRO contested the allegation that it violated the EPAA, it could obtain an evidentiary hearing before the OHA, the office charged with determining whether a final remedial order should be issued. See 10 C.F.R. § 205.193.

If a remedial order was issued by the OHA and was upheld throughout the appellate process, a restitution fund could be established. "The Petroleum Overcharge Distribution and Restitution Act (PODRA), 15 U.S.C. § 4501 *et seq.*, require[d] the Secretary of Energy to identify persons who have been harmed by a violation of the EPAA regulations and to use recovered funds to make restitution 'to the maximum extent possible.'" Consolidated Edison Co. v. O'Leary, 131 F.3d at 1478 (quoting 15 U.S.C. § 4502). Restitution proceedings were conducted in accordance with the Subpart V procedures.[2] Id. at

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[2] The DOE's end-user restitution program was administered under the authority of 10 C.F.R. Part 205, Subpart

1478-79 (citing 10 C.F.R. §§ 205.280-.288). The Subpart V refund procedures "provide a mechanism by which persons allegedly injured by a particular violation may provide proof of the nature and degree of their injury." Id. At 1479. Subpart V was designed to ensure that "refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy." Rio Grande, El Paso and Santa Fe R.R. Co. v. Department of Energy, 234 F.3d 1, 6 (Fed. Cir. 2000) (quoting 10 C.F.R. § 205.280).

II. Factual Background

In 1985, the DOE began § 209 enforcement proceedings against Cities Service Oil and Gas Corporation, now Occidental Petroleum Corporation ("Occidental"), alleging that Occidental violated price regulations. The DOE sought to recover the alleged overcharges from Occidental to create a restitution fund from which refunds could be paid to end users of Occidental's petroleum products. Plaintiff is an attorney who represented a group of these end users. His clients were permitted to participate in the enforcement proceeding, but they withdrew their participation in 1986.

After his clients withdrew, plaintiff began to represent a new group of end users who requested leave to participate in the § 209 enforcement proceeding against Occidental.

V, and is generally referred to simply as "Subpart V". City of New York v. Watkins, 757 F. Supp. 72, 74 (D.D.C. 1991), aff'd per curiam, 956 F.2d 1175 (Temp. Emer. Ct. App. 1992).

Plaintiff's request on behalf of this group of end users was denied.

In 1988, the OHA issued a remedial order to Occidental, but the order was ultimately reversed and vacated. In 1993, plaintiff's clients were permitted to intervene in the § 209 proceeding for the limited purpose of appealing the Federal Energy Regulatory Commission's decision vacating the remedial order against Occidental.

Meanwhile, in 1992, the DOE issued a second remedial order against Occidental. Following mediation, the DOE's § 209 enforcement proceeding against Occidental settled. The settlement provided for the creation of a restitution fund which would be allocated 20% to end users, 40% to the United States Treasury, and 40% to certain states.

In a separate, private settlement with Occidental, plaintiff's clients were paid funds outside the § 209 restitution fund. Plaintiff received $400,000 in attorney's fees from the funds paid by Occidental pursuant to this private settlement.

In September 1995, plaintiff filed an application with the DOE seeking attorney's fees from the restitution fund established as a result of the settlement of the § 209 proceedings against Occidental. Although neither plaintiff nor his clients were parties to the § 209 settlement, plaintiff requested approximately 3% of the 20% portion of the fund allocated for end users. Plaintiff alleges that his efforts on behalf of his clients benefitted the entire class of end users and, therefore, that he should be paid fees from the end users'

portion of the restitution fund in addition to the $400,000 in fees already paid by his clients.

In July 1997, the OHA denied plaintiff's request for fees from the restitution fund.[3] The OHA noted that it had "never awarded attorneys fees from Subpart V crude oil or refined product overcharge monies." OHA Decision, at III.A. The OHA held that there was "no statutory or regulatory basis for a grant of Mr. Kalodner's fee request." Id. at III.B. The OHA stated specifically that the "Subpart V regulations do not provide for the distribution of Section 209 funds for attorneys fees." Id.

The OHA also addressed plaintiff's argument that he was entitled to recover his fees from the restitution fund because the fund was created as a result of his efforts. The OHA noted that the Occidental proceeding was under § 209 and that "the record clearly reflects that DOE enforcement brought, pursued, and settled the charges against Occidental. Id. at III.C.3. The OHA found that plaintiff's "claim that he has brought benefits to all Subpart V claimants [was] unconvincing." Id. Based on these conclusions, the OHA denied plaintiff's fee application.

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3 The OHA's decision is attached as Exhibit A to defendant's brief in support of his motion for judgment on the pleadings.

DISCUSSION

Defendant has moved for judgment on plaintiff's complaint. He challenges plaintiff's right to appeal the OHA's decision and argues that plaintiff has pled no valid redressable claim. See Fed. R. Civ. P. 12(b)(6). A complaint should not be dismissed for failure to state a claim unless the plaintiff would be entitled to no relief even when all the facts pled are assumed to be true. See Weyrich v. The New Republic, Inc., 235 F.3d 617, 623 (D.C. Cir. 2001).

The parties do not dispute that the OHA's decision is not subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 710-706. The EPAA, through its incorporation of the ESA, specifically excludes the APA as a basis for jurisdiction to review § 209 matters. See 15 U.S.C. § 754(a)(1). Thus, the APA provides plaintiff no right to appeal the OHA's decision.

Nor would a right to appeal flow from plaintiff's characterization of his claim in this case as a request for "an allocation" from the Occidental restitution fund. See Plaintiff's Motion for Partial Summary Judgment, at 43 ("what plaintiff here seeks is an allocation of a small percentage"); Plaintiff's Statement of Points and Authorities, at 40 (plaintiff "seeks only an allocation of the share which will . . . be paid to end users"). Plaintiff's request that this Court review the OHA's decision not to allocate a percentage of the § 209 restitution fund to pay attorney's fees is precluded by the Federal Circuit's decision in Consolidated Edison Co. v. O'Leary, 117 F.3d 538 (Fed. Cir.

1997), cert. denied, 522 U.S. 1108 (1998). O'Leary establishes clearly that a private complaint fails to state a claim upon which relief may be granted when the complaint challenges the allocation of funds obtained under the public remedies section of the EPAA. Id. at 543. It also establishes that a DOE decision about the distribution of such funds is a non-justiciable matter committed to the discretion of the agency. Id. at 545.

Plaintiff argues that he is entitled to challenge the OHA's decision notwithstanding the O'Leary decision, citing as support for his argument cases in which dissatisfied Subpart V claimants were permitted to appeal OHA decisions regarding their claims or the claims of other Subpart V end users.[4] Plaintiff's reliance on this line of authority is unavailing, however, because plaintiff is not a Subpart V claimant. Subpart V provides the procedure for the distribution of refunds from the restitution fund and, indeed, is named "Subpart V - Special Procedures for Distribution of Refunds". 10 C.F.R. § 205.280. Pursuant to Subpart V, "claimants are entitled to a refund proportional to their volume of crude oil consumption." Consolidated Edison Co. v. O'Leary, 117 F.3d at 541. The Subpart V regulations provide a framework for persons injured

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See Plaintiff's Statement of Points and Authorities, at 34-36 (citing Goodyear Tire & Rubber Co. v. Department of Energy, 118 F.3d 1531 (Fed. Cir. 1997) and other cases by Subpart V claimants challenging OHA refund decisions).

by actual or alleged violations of the EPAA to obtain refunds from the restitution fund. Rio Grande, 234 F.3d at 6. "Importantly, the statutory and regulatory scheme emphasizes that only those who are injured by actual or alleged violations of pricing and allocation regulations are eligible for payments from the restitution fund." Id. Because plaintiff was not injured by a violation of the EPAA and does not seek a "refund" of overcharges resulting from a violation of the EPAA, he does not qualify as a Subpart V claimant who would be entitled to challenge the OHA's decisions regarding the distribution of the restitution fund established as a result of the settlement of the DOE's § 209 proceedings against Occidental.

Plaintiff's attempt to obtain judicial review of the OHA's decision is not supported by the Federal Circuit's holding in Consolidated Edison Co. v. Richardson, 233 F.3d 1376 (Fed. Cir. 2000). In that case, the Federal Circuit permitted private plaintiffs, who were Subpart V claimants, to challenge the award of a portion of the restitution fund to another Subpart V claimant where the "DOE has already determined that plaintiffs are proper claimants." Id. at 1383. In this case, however, there has been no DOE determination that plaintiff or any attorney is a proper claimant to the Occidental restitution fund.

Plaintiff also argues that he is entitled to fees in this case because he was involved in two prior settlement agreements (in non-section 209 cases) which provided for recovery of

attorney's fees[5] and based on general case law regarding

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5 The Stripper Well Settlement, 653 F. Supp. 108 (D. Kan. 1986), aff'd, 855 F.2d 865 (Temp. Emer. Ct. App. 1988), originated from private litigation filed by oil producers challenging certain DOE regulations other than those at issue here. It was not a public enforcement proceeding by the DOE. The district court enjoined enforcement of the regulations, but ordered the oil producers to deposit in escrow "the difference between the stripper well price and the controlled price of crude oil affected by the injunction." Id. at 109. The Court of Appeals upheld the regulations on appeal and, as a result, the escrow of overcharges needed to be refunded. The settlement agreement in that private litigation, which settled the dispute regarding how the escrowed funds should be distributed, provided for attorney's fees to be distributed to plaintiff from the fund. In that case, unlike here, plaintiff represented parties in the lawsuit that resulted in the creation of the fund to be distributed.

Plaintiff also received attorney's fees as part of the Citronelle Settlement Agreement, approved by the district court in Amoco Oil Co. v. Dept. of Energy, Civil Action No. H-94-2423 (S.D. Tex. 1995). The settlement resolved both administrative proceedings and private litigation regarding the distribution of an escrow account containing "exception relief funds." See Citronelle Settlement Agreement, Attachment E to

recovery of attorney's fees from a "common fund" in class action litigation. These arguments address whether attorney's fees may be awarded either as part of a settlement covering some private litigation or by a court in connection with a class action. The prior settlement agreements and the "common fund" theory do not, however, provide a basis for this Court to review the OHA's decision to deny attorney's fees to plaintiff from a fund which was established as a result of the settlement of a § 209 enforcement proceeding.

Plaintiff does not qualify as a Subpart V claimant. Consequently, he has not stated a claim upon which relief can be granted because he has not shown a legal basis for claiming attorney's fees from the restitution fund established following the settlement of the DOE's § 209 enforcement proceeding against Occidental. Nor is the DOE's decision not to distribute attorney's fees from this fund justiciable.

Plaintiff's Statement of Points and Authorities, at 1.

CONCLUSION

Plaintiff's complaint fails to state a claim upon which relief can be granted. Defendant is entitled to judgment on plaintiff's complaint, and the remaining motions are moot. A final order accompanies this Memorandum Opinion.

SIGNED this 30th day of July, 2001.

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP P. KALODNER	)	FILED
	)	JUL 30 2001
Plaintiff	)	
v.	)	Civil Action No. 97-2013
	)	(RWR)
SPENCER ABRAHAM,	)	
Secretary of Energy, et al.,	)	
Defendants	)	

FINAL ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' Motion for Judgment on the Pleadings [8] be, and hereby is, **GRANTED**. All other pending motions are **DENIED** as moot.

This is a final appealable order.

SIGNED this 30th day of July, 2001.

RICHARD W. ROBERTS
United States District Judge

26 DOE § 82,503
Kalodner, Philip P; Gladwyne, Pennsylvania
(Case No. VSG-0001)
Issued July 16, 1997

On October 17, 1995, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received a submission by Philip P. Kalodner, claiming an entitlement to a "class fee." The claim concerns funds remitted by the Occidental Petroleum Corporation (Occidental) pursuant to a 1995 consent order. Mr. Kalodner claims that he is entitled to a fee for representing Subpart V claimants as a "class" in the Occidental enforcement proceeding. As explained below, we have determined that Mr. Kalodner's request should be denied.

I. Background

A. *Regulatory*

This case concerns the petroleum price and allocation controls that were in effect from 1973 to 1981. The relevant statutes provided for separate public and private enforcement actions for violations of those controls. The separate provisions were set forth in the Economic Stabilization Act of 1971 (ESA), Pub. L. No. 92-210, 85 Stat. 743 (1971), 12 U.S.C. § 1904 note. Section 209 of the ESA provided for public enforcement actions; Section 210 of the ESA provided for private enforcement actions. Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 expressly incorporated these

provisions, Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. § 754(a)(1) (1982).

Subpart O of the DOE procedural regulations set forth procedures, whereby the office within the DOE responsible for enforcement (DOE enforcement) could bring a Section 209 administrative enforcement action against an alleged violator. 10 C.F.R. Part 205, Subpart O. Subpart O provided for the issuance of a proposed remedial order by DOE enforcement and review of a recipient's objections by the OHA. Subpart O also permitted the filing of requests to participate in the OHA proceeding, and it gave the OHA the authority to determine whether, or to what extent, participation was appropriate. 10 C.F.R. § 205.194.

As the result of its Section 209 actions, the agency collected monies that firms had received as the result of regulatory violations. In 1979, the DOE promulgated Subpart V of the DOE procedural regulations, which set forth procedures for refunding such monies to injured purchasers. 10 C.F.R. Part 205, Subpart V (hereinafter Subpart V), 44 Fed. Reg. 8566 (February 9, 1979). In 1986, the DOE entered into the Stripper Well Settlement Agreement which (i) resolved court litigation over a type of crude oil overcharge and (ii) established a framework for the distribution of all crude oil overcharges to be recovered by the DOE. *See In re: Stripper Well Litigation*, 653 F. Supp. 108 (D. Kan. 1986). In conjunction with the Agreement, the DOE announced its Modified Statement of Restitutionary Policy in Crude Oil Cases (MSRP). *See* 51 Fed.

Reg. 27899 (August 4, 1986); *Order Implementing the MSRP*, 51 Fed. Reg. 29689 (August 20, 1986). Under the MSRP, up to 20 percent of crude oil overcharge funds may be reserved for direct restitutions to injured purchasers pursuant to Subpart V procedures, with the remainder divided equally between the states and the federal government. Two months later, Congress passed the Petroleum Overcharge Distribution Act of 1986 (PODRA), 42 U.S.C. § 4501 *et seq*. PODRA left in place the distribution of crude oil overcharge funds provided for in the Stripper Well Settlement Agreement and the MSRP. *See* 42 U.S.C. § 4501(c).

B. *Factual*

In 1985, pursuant to Section 209 of the ESA, DOE enforcement initiated an administrative enforcement proceeding against Occidental. The Occidental enforcement proceeding involved two proposed remedial orders, one issued in 1985 and one issued in 1992. In 1988, the OHA issued a portion of the 1985 proposed remedial order as a remedial order and remanded the remainder of the 1985 proposed remedial order to DOE enforcement. *Cities Service Oil and Gas Corp.*, 17 DOE ¶83,021 (1988). Occidental appealed the 1988 remedial order to the Federal Energy Regulatory Commission (FERC). In 1992, while the 1988 remedial order was still pending at FERC, DOE enforcement issued a second proposed remedial order. *See OXY USA Inc.*, 23 DOE ¶84,004 (1993) (interlocutory order). In 1993, FERC reversed the 1988 remedial order. *Cities Service Oil and Gas Corp.*, 65 FERC

¶61,403 (1993), *reconsideration denied*, 66 FERC ¶61,222 (1994). A group of states, represented by James F. Flug, and a group of utilities, transporters, and manufacturers (the UTM), represented by Mr. Kalodner, appealed the FERC reversal to federal district court. The court granted the DOE's motion to dismiss for lack of standing. *Alabama v. FERC*, 3 Fed. Energy Guidelines ¶26,693 (D.D.C. June 8, 1995).

In 1995, the DOE and Occidental entered into a consent order. 60 Fed. Reg. 43130 (August 18, 1995). Occidental agreed to remit $100 million to the DOE within 30 days of the consent order and then make five annual payments of $35 million plus interest. Occidental apparently also entered into a private agreement with the UTM, pursuant to which Occidental paid the UTM $2.25 million, of which Mr. Kalodner received $400,000. Kalodner Fee Request at 16.

Upon Occidental's remittance of its initial $100 million payment, DOE enforcement filed a Subpart V Petition for Implementation of Special Refund Procedures with the OHA. The OHA then issued an Implementation Order. *OXY USA, Inc.*, 25 DOE ¶85,807 (1996). Consistent with the MSRP, the Implementation Order (i) reserved 20 percent of Occidental's $100 million payment, and 20 percent of each future payment, for Subpart V claimants and (ii) allocated the remaining 80 percent equally between states and federal government.

C. *Procedural*

On September 19, 1995, Mr. Kalodner filed his fee request with DOE enforcement. The OHA had acquired jurisdiction

over the Occidental funds one day earlier, when DOE enforcement filed its Subpart V Petition. *See OXY USA, Inc.*, 25 DOE ¶85,087 at 88,220 (1996). Accordingly, DOE enforcement referred the fee request to the OHA. The OHA docketed the request as a Petition for Special Redress, because the request did not fall under any specific DOE procedural regulations.

The OHA required that Mr. Kalodner provide notice of his fee request to large Subpart V claimants and representatives. The OHA required that Mr. Kalodner serve notice on (i) the fifty largest claimants and (ii) attorneys and filing services who represent claimants before the OHA.

The OHA received a number of comments in opposition to Mr. Kalodner's fee request. The following Subpart V claimants filed individual comments opposing his request: National Railroad Passenger Corp. (Amtrak), Bethlehem Steel Corporation, Cabot Corporation, Defense Logistics Agency, New York Power Authority, Pfizer, Inc. and PPG Industries, Inc. In addition, two groups of states filed comments opposing Mr. Kalodner's request. Finally, a refund filing service, Energy Refunds, Inc., filed comments opposing Mr. Kalodner's request. There were no comments in support of his request.

II. The Fee Request

Mr. Kalodner seeks $1.5 million from the share of the Occidental consent order funds reserved for Subpart V claimants. Mr. Kalodner claims that without his participation, Occidental would not have settled or would have settled for a smaller sum. Because a portion of the settlement amount was reserved for Subpart V claimants, Mr. Kalodner maintains that they benefited from his participation. Accordingly, Mr. Kalodner maintains that he is entitled to a fee from the Subpart V funds. Mr. Kalodner contends that various legal authorities support a grant of his fee request. Mr. Kalodner also cites, as precedent for the instant request, two court-approved settlement agreements in which he received a fee.

III. Analysis

A. *OHA General Precedent*

The OHA has never awarded attorneys fees from Subpart V crude oil or refined product overcharge monies. In fact, the OHA has awarded attorneys fees in only two limited situations, in which there was specific authority to do so. The first situation involves whistleblower proceedings. The regulations governing whistleblower proceedings specifically permit the OHA to order a DOE contractor to reimburse a successful whistleblower for his attorney fees. 10 C.F.R. § 708.10(c); *see, e.g., Ronald Sorri*, 23 DOE ¶87,503 (1993). The second situation occurred over fifteen years ago and was based on a Comptroller of the Currency decision. That decision permitted financial assistance from appropriated funds to permit a party

to participate in an agency proceeding where (i) the party's participation was necessary to permit the agency to fulfil its regulatory mandate and (ii) the party was indigent or otherwise unable to participate without assistance. *Nuclear Regulatory Commission*, Comp. Gen. Decision, No. B-92288 (February 19, 1976). The OHA relied on that decision to provide appropriated funds to two consumer groups to permit them to participate in agency proceedings. *See Consumers Union*, 6 DOE ¶82,555 (1980) (exception request from the refiner price rule); *Consumers Federation*, 1 DOE ¶82,565 (1978) (evaluation of the decontrol of middle distillates).

B. *The Status of Subpart V Claimants In a Section 209 Action*

There is no statutory or regulatory basis for a grant of Mr. Kalodner's fee request. Mr. Kalodner's purposed class of Subpart V claimants has no cause of action or right of intervention with respect a Section 209 action, which is public in nature. Mr. Kalodner is not entitled to a fee for his purported representation of a class with no cause of action or right of intervention.

The courts have consistently held that the ESA created separate public and private enforcement actions, Sections 209 and 210, respectively. Accordingly, the courts have refused to find any implied private rights in a Section 209 action. The most recent case on this issue involved Mr. Kalodner's contention that Subpart V claimants were entitled to a greater portion of crude oil overcharge funds than the allocated 20 percent. The Federal Circuit held that Subpart V claimants do

not have any cause of action with respect to a Section 209 enforcement proceeding and, therefore, no basis for challenging the allocation. *Consolidated Edison v. O'Leary*, Civ. No. 96-1248, -1257 (Fed. Cir., June 19, 1997) (slip op.). *See also Van Vranken v. DOE*, 882 F.2d 514, 517 (Temp. Emer. Ct. App. 1989); *Getty Oil Co. v. DOE*, 865 F.2d 270, 275-76 (Temp. Emer. Ct. App. 1988).

Consistent with the separate nature of public and private enforcement remedies, the Subpart V regulations do not provide for the distribution of Section 209 funds for attorneys fees. Subpart V provides for "refunds" to "injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy." 10 C.F.R. § 205.280. The OHA has never granted a request for attorneys fees from Subpart V funds. *See generally Southern California Edison*, 17 DOE ¶85,389 (1988) (request for attorneys fees by Mr. Kalodner denied); *Apex Co./Go-Tane Service Station*, Case No. RF-342-278 (Proposed Decision and Order issued July 7, 1995) (request for attorneys fees by applicant's law firm denied).

C. *Mr. Kalodner's Arguments*

1. *Section 205.287 of Subpart V*

Mr. Kalodner argues that Section 205.287(b) of Subpart V authorizes the grant of his fee request. Section 205.287 provides in full:

205.287(b). Escrow accounts, segregated funds and other guarantees.

(a) In implementing the refund procedures specified in this Subpart, the Director of the Office of Hearings and Appeals or his designee shall issue an order providing for the custody of the funds to be tendered pursuant to the Remedial Order or Consent Order. This Order may require placement of the funds in an appropriate interest-bearing escrow account, retention of the funds by the firm in a segregated account under such terms and conditions as are specified by the DOE, or the posting of a sufficient bond or other guarantee to ensure payment.

(b) *All costs and charges approved by the Office of Hearings and Appeals and incurred in connection with the processing of Applications for Refund* or incurred by an escrow agent shall be paid from the amount of funds, including any accumulated interest, to be remitted pursuant to the Remedial Order or Consent Order.

(c) After the expenses referred to in subsection (b) have been satisfied and refunds distributed to successful applicants, any remaining funds remitted pursuant to the Remedial Order or Consent Order shall be deposited in the United States Treasury of distributed in any other manner specified in the Decision and Order referred to in Section 205.282(c).

(d) Funds contained in the escrow account, segregated fund, or guaranteed by other approved means shall be disbursed only upon written order of the Office of Hearings and Appeals.

10 C.F.R. § 205.287(b) (emphasis added). Mr. Kalodner claims that the underscored language authorizes the grant of his fee request.

Section 207.287(b) does not warrant the grant of Mr. Kalodner's fee request. Section 205.287(b) applies to "costs and charges" that are approved by the OHA and "incurred in connection with the processing of Applications for Refund." Attorneys fees do not fall within the plain meaning of the regulation. Attorneys fees are not "costs and charges"; Mr. Kalodner's representation was not "incurred in connection with the processing of Applications for Refunds." Moreover, the preamble to the regulation states that the provision refers to "certain expenses incurred in administering a refund proceeding," i.e., (i) the cost of "an administrator for performing clerical and other functions associated with evaluating refund applications" and (ii) "expenses associated with the maintenance of an escrow account." 44 Fed. Reg. 8562, 8564 (February 9, 1979). Thus, the provision concerns expenses that OHA might incur in appointing an administrator or escrow agent, not to attorneys fees. Finally, we note that OHA has never utilized its authority under Section 205.287(b). Instead, all OHA disbursements of Subpart V funds have been based solely on a determination of the actual or alleged violation amount and the extent to which that amount was absorbed by the claimant.

2. *Mr. Kalodner's receipt of attorneys fees pursuant to two settlement agreements*

Mr. Kalodner argues that his receipt of attorneys fees pursuant to two settlement agreements is precedent for the grant of his request. He cites the Stripper Well Settlement Agreement and the Citronelle Settlement Agreement.

The fact that Mr. Kalodner received attorneys fees pursuant to the settlement of two court proceedings in inapposite. Settlements represent a compromise of the parties' rights and obligations. As indicated above, Mr. Kalodner has no right to a fee under the governing statute and regulations.

3. *Mr. Kalodner's fairness argument*

Mr. Kalodner argues that, without his participation in the Occidental proceeding, there would have been no settlement or a much smaller settlement. Mr. Kalodner argues that the benefit that he provided to all Subpart V claimants in the Occidental proceedings is consistent with his participation in other DOE proceedings.

Mr. Kalodner's view of his value in the Occidental enforcement proceeding is inflated. The Occidental proceeding was a Section 209 proceeding. The record clearly reflects that DOE enforcement brought, pursued, and settled the charges against Occidental.

Moreover, Mr. Kalodner's claim that he has brought benefits to all Subpart V claimants is unconvincing. Indeed, he has opposed the Subpart V applications of federal and state governmental entities. *See, e.g., Defense Logistics Agency*, 24

DOE ¶85,134 (1995); *Power Authority of State of New York*, Case No. RF272-54935 (May 10, 1991) (unpublished opinion). Not surprisingly, some of those entities now object to funding Mr. Kalodner's requested fee. See Comments filed by (i) Defense Logistics Agency, (ii) New York Power Authority, (iii) a group of states represented by James F. Flug, and (iv) a group of states represented by Bernard Nash. Similarly, Mr. Kalodner filed two separate actions arguing that the UTM had special status as early filers, which entitled them to a large volumetric and earlier payment than other Subpart V claimants. *Consolidated Edison v. O'Leary*, Civ. No. 96-1248, -1257 (Fed. Cir., June 19, 1997) (district court's dismissal of complaint affirmed); *Consolidated Edison v. O'Leary*, 3 Fed. Energy Guidelines ¶26,714 (Fed. Cir., March 20, 1997) (district court's dismissal of complaint affirmed). Currently, Mr. Kalodner seeks to reverse the OHA's denial of certain large volume applicants, which reversal would further reduce the funds for existing Subpart V claimants. *Hoechst Celanese and Chemical Group, Inc.*, Civ. No. 1:95CV02149 (D.D.C. filed November 20, 1995). These actions indicate to us that, for the purpose of supporting his claim for a class fee, Mr. Kalodner has exaggerated the extent to which he has helped all Subpart V claimants.

It Is Therefore Ordered That:

(1) The Petition for Special Redress filed by Philip P. Kalodner is hereby denied.

(2) This is a final Order of the Department of Energy.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5339 **SEPTEMBER TERM, 2002**
97cv02013
Filed On: January 10, 2003

Philip P. Kalodner,
Appellant

v.

Spencer Abraham, Secretary of Energy, United States, et al.,
Appellees

BEFORE: Edwards, Randolph and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 27, 2002, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Philip P. Kalodner,
Appellant

v.

Spencer Abraham, Secretary of Energy, United States, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: Michael C. McGrail
Deputy Clerk

ECONOMIC STABILIZATION ACT AMENDMENTS OF 1971

PUBLIC LAW 92-210; 85 STAT. 743

Sec. 2. Title II of the Act entitled "An Act to amend the Defense Production Act of 1950, and for other purposes", approved August 15, 1970 (Public Law 91-379), as amended, is amended to read as follows:

. . .

"§ 209. Injunction and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the

overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have

exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

P.L. 93-159

ADMINISTRATION AND ENFORCEMENT

Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

§ 7193. Remedial Orders

(a) Violations of rules, regulations, or orders promulgated pursuant to Emergency Petroleum Allocation Act of 1973

If upon investigation the Secretary or his authorized representative believes that a person has violated any regulation, rule, or order described in section 7191(a) of this title promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 [15 U.S.C.A. § 751 et seq.], he may issue a remedial order to the person. Each remedial order shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of such rule, regulation, or order alleged to have been violated. For purposes of this section "person" includes any individual, association, company, corporation, partnership, or other entity however organized.

(b) Notice of intent to contest; final order not subject to review

If within thirty days after the receipt of the remedial order issued by the Secretary, the person fails to notify the Secretary that he intends to contest the remedial order, the remedial order shall become effective and shall be deemed a final order of the Secretary and not subject to review by any court or agency.

(c) Notice of contestation to Commission; stay; hearing; cross examination; final order; enforcement and review

If within thirty days after the receipt of the remedial order issued by the Secretary, the person notifies the Secretary that he intends to contest a remedial order issued under subsection (a) of this section, the Secretary shall immediately advise the Commission of such notification. Upon such notice, the Commission shall stay the effect of the remedial order, unless the Commission finds the public interest requires immediate compliance with such remedial order. The Commission shall, upon request, afford an opportunity for a hearing including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's remedial order, or directing other appropriate relief, and such order shall, for the purpose of judicial review, constitute a final agency action, except that enforcement and other judicial review of such action shall be the responsibility of the Secretary.

PETROLEUM OVERCHARGE RESTITUTION AND DISTRIBUTION ACT

15 U.S.C.

§ 4502. Identification and disbursement of restitutionary amounts

(a) **In general**

(1) Subject to paragraph (2)—

(A) all rulings, policies, or other statements (including any administrative order or settlement agreement) issued after October 21, 1986, by any office, official, or employee of the Department of Energy; and

(B) all orders, including declaratory judgments, issued by any court after October 21, 1986, shall be consistent with the provisions of this chapter.

(2) Nothing in this section shall affect the settlement approved on July 7, 1986, in In Re: the Department of Energy Stripper Well Exemption Litigation M.D.L. No. 378, in the United States District Court for the District of Kansas.

(b) **Disbursement of restitutionary amounts as direct restitution to injured persons**

(1) The Secretary shall, through the Office of Hearings and Appeals of the Department of Energy, conduct proceedings expeditiously in accordance with subpart V regulations for the purpose of, to the maximum extent possible—

(A) identifying persons or classes of persons injured by any actual or alleged violation of the petroleum pricing and

allocation regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973 [15 U.S.C.A. § 751 et seq.] or the Economic Stabilization Act of 1970;

(B) establishing the amount of any injury incurred by such persons; and

(C) making restitution, through the disbursement of amounts in the escrow accounts described in subsections (b) and (d) of section 4501 of this title, to such persons.

(2) In conducting such proceedings, the Secretary shall take into consideration the reports released pursuant to several orders of the applicable Federal district court in In Re: the Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378, in the United States District Court for the District of Kansas.

28 U.S.C.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

. . .

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

. . .

SUBPART V—SPECIAL PROCEDURES FOR DISTRIBUTIONS OF REFUNDS

10 C.F.R.

§ 205.280 Purpose and scope.

This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive.

§ 205.281 Petition for implementation of special refund procedures

(a) At any time after the issuance of a Remedial Order (including for purposes of this subpart a Remedial Order, for Immediate Compliance, and an Order of Disallowance), or a Consent Order, the Special Counsel of the Department of Energy, the ERA Office of Enforcement or any other enforcement official of the Department of Energy may file with the Office of Hearings and Appeals a Petition for the Implementation of Special Refund Procedures.

(b) The Petition shall state that the person filing it has been unable readily either to identify the persons who are entitled to

refunds to be remitted pursuant to a Remedial Order or a Consent Order or to ascertain the amounts of refunds that such persons are entitled to receive. The Petition shall request that the Office of Hearings and Appeals institute appropriate proceedings under this Subpart to distribute the funds referred to in the enforcement documents.

(c) The Petition shall contain a copy of each relevant enforcement document, shall be filed in duplicate, and shall meet the requirements of § 205.9 of this part.

§ 205.282 Evaluation of petition by the Office of Hearings and Appeals.

(a) After considering the Petition, the Director of the Office of Hearings and Appeals or his designee shall issue a Proposed Decision and Order. The Proposed Decision and Order shall generally describe the nature of the particular refund proceeding and shall set forth the standards and procedures that the Office of Hearings and Appeals intends to apply in evaluating refund claims.

(b) The Proposed Decision and Order shall be published in the FEDERAL REGISTER together with a statement that any member of the public may submit written comments to the Office of Hearings and Appeals with respect to the matter. At least 30 days following publication in the FEDERAL REGISTER shall be provided for the submission of comments.

(c) After considering the comments submitted, the Director of the Office of Hearings and Appeals or his designee shall issue a final Decision and Order which shall govern the

disposition of the refunds. The final Decision and Order shall also be published in the FEDERAL REGISTER.

(d) The final Decision and Order shall set forth the standards and procedures that will be used in evaluating individual Applications for Refunds and distributing the refund amount. Those standards and procedures shall be consistent with the provisions of this subpart.

(e) In establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

§ 205.283 Applications for refund.

(a) Any person entitled to a refund pursuant to a final Decision and Order issued pursuant to § 205.282 may file an Application for Refund. All Appli-cations must be signed by the applicant and specify the DOE order to which they pertain. Any Application for a refund in excess of $100 must be file in duplicate, and a copy of that Application will be available for public inspection in the DOE Public Docket Room at 2000 M Street, NW., Washington, DC. Any applicant who believes that his Application contains confidential information must so indicate on the first page of his Application and submit two additional copies of his Application from which the information that the applicant claims is confidential has been deleted,

together with a statement specifying why any such information is privileged or confidential.

(b) The contents of an Application for Refund shall be specified in the final Decision and Order referred to in § 205.282(c). A filing deadline for Applications shall also be specified in the final Decision and Order, and shall be no less than 90 days after the publication of the Order in the FEDERAL REGISTER.

(c) Each Application shall be in writing and signed by the applicant, and shall indicate whether the applicant or any person acting on his instructions has filed or intends to file any other Application or claim of whatever nature regarding the matters at issue in the underlying enforcement proceeding. Each Application shall also include a sworn statement by the applicant that all information in his Application is true and correct to the best of his knowledge and belief.

§ 205.284 Processing of applications.

(a) The Director of the Office of Hearings and Appeals may appoint an administrator to evaluate Applications under guidelines established by the Office of Hearings and Appeals. The administrator, if he is not a Federal Government employee, may be compensated from the funds referred to in the Remedial Order or Consent Order. The administrator may design and distribute an optional application form for the convenience of the applicants.

(b) The Office of Hearings and Appeals or its designee may initiate an investigation of any statement made in an

Application and may require verification of any document submitted in support of a claim. In evaluating an Application, the Office of Hearings and Appeals or its designee may solicit and consider information obtained from any source and may on its own initiative convene a hearing or conference, if it determines that a hearing or conference will advance its evaluation of an Application.

(c) The Director of the Office of Hearings and Appeals or his designee shall conduct any hearing or conference convened with respect to an Application for Refund and shall specify the time and place for the hearing or conference and notify the applicant. The official conducting the hearing may administer oaths and affirmations, rule on the presentation of information, receive relevant information, dispose of procedural requests, determine the format of the hearing and otherwise regulate the course of the hearing. The provisions of § 205.8 of this part which relate to subpoenas and witness fees shall apply to any hearing convened with respect to an application for refund, except that § 205.8(h) (2), (3) and (4) shall not apply.

(d) Upon consideration of an Application and other relevant information received during the course of a refund proceeding, the Director of the Office of Hearings and Appeals or his designee shall issue an order granting or denying the Application. The order shall contain a concise statement of the relevant facts and the legal basis for the order. A copy of the order, with such modification as is necessary to ensure the confidentiality of information protected from public disclosure

by 18 U.S.C. 1905, may be obtained upon request by an applicant or any other person who participated in the proceeding.

§ 205.285 Effect of failure to file a timely application.

An Application for Refund must be filed no later than the date that the Office of Hearings and Appeals establishes pursuant to § 205.283(b). Any Application that is not filed on a timely basis may be summarily dismissed. The Office of Hearings and Appeals or its designee may, however, grant extensions of time for good cause shown. Any request for an extension of time must generally be submitted in writing prior to the deadline.

§ 205.286 Limitations on amount of refunds.

(a) The aggregate amount of all refunds approved by the Office of Hearings and Appeals or its designee in a given case shall not exceed the amount to be remitted pursuant to the relevant DOE enforcement order, plus any accumulated interest, reduced by the amount of any administrative costs approved by the Office of Hearings and Appeals. In the event that the aggregate amount of approved claims exceeds the aggregate amount of funds specified above, the Office of Hearings and Appeals may make refunds on a pro rata basis. The Office of Hearings and Appeals may delay payment of any refunds until all Applications have been processed.

(b) The Office of Hearings and Appeals may decline to consider Applications for refund amounts that, in view of the

direct administrative costs involved, are too small to warrant individual consideration.

§ 205.287 Escrow accounts, segregated funds and other guarantees.

(a) In implementing the refund procedures specified in this subpart, the Director of the Office of Hearings and Appeals or his designee shall issue an order providing for the custody of the funds to be tendered pursuant to the Remedial Order or Consent Order. This Order may require placement of the funds in an appropriate interest-bearing escrow account, retention of the funds by the firm in a segregated account under such terms and conditions as are specified by the DOE, or the posting of a sufficient bond or other guarantee to ensure payment.

(b) All costs and charges approved by the Office of Hearings and Appeals and incurred in connection with the processing of Applications for Refund or incurred by an escrow agent shall be paid from the amount of funds, including any accumulated interest, to be remitted pursuant to the Remedial Order or Consent Order.

(c) After the expenses referred to in paragraph (b) of this section have been satisfied and refunds distributed to successful applicants, any remaining funds remitted pursuant to the Remedial Order or the Consent Order shall be deposited in the United States Treasury or distributed in any other manner specified in the Decision and Order referred to in § 205.282(c).

(d) Funds contained in an escrow account, segregated fund, or guaranteed by other approved means shall be disbursed only upon written order of the Office of Hearings and Appeals.

§ 205.288 Interim and ancillary orders.

The Director of the Office of Hearings and Appeal or his designee may issue any interim or ancillary orders, or make any rulings or determinations to ensure that refund proceedings, including the actions of the administrator and the custodian of the funds involved in a refund proceeding, are conducted in an appropriate manner and are not unduly delayed.